A **MACKT LOGISTICS (M) SDN BHD**

v.

MALAYSIAN AIRLINE SYSTEM BERHAD

B COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
LINTON ALBERT JCA
ABDUL AZIZ RAHIM JCA
[CIVIL APPEAL NO: W-02-2925-11-2011]
C 29 NOVEMBER 2013

COMPANY LAW: *Separate legal entity - Lifting the veil of incorporation - Whether companies were separate legal entities - Whether trial judge erred in lifting veil of incorporation having found companies* D *different legal entities - Whether piercing of corporate veil must be clearly pleaded - Whether failure to plead fatal*

CONTRACT: *Guarantee - Bank guarantee - Conditional guarantee - Call on bank guarantee - Whether subject to breach under sales agency agreement - Whether sales agency agreement breached - Whether letter of* E *demand referred to sales agency agreement - Whether liabilities or monies payable specified*

CIVIL PROCEDURE: *Notice of demand - Validity - Whether valid and proper - Call on bank guarantee - Whether subject to breach under* F *sales agency agreement - Whether sales agency agreement breached - Whether letter of demand referred to sales agency agreement - Whether letter of demand vague and defective - Whether letter of demand rendered bad and invalid in law*

G The appellant ('plaintiff') carried on the business of air cargo transportation and handling of consignment and dealt with various airlines, including the respondent ('defendant'). In order to facilitate the dealing, the plaintiff entered into a sales agency agreement with the defendant which required the plaintiff to H provide a bank guarantee by way of a security, which the plaintiff did. The bank guarantee was a conditional guarantee and was valid for a period of one year. Before the expiry of the bank guarantee, the defendant issued a letter of demand to the bank to call on the guarantee. The letter of demand alleged that the I plaintiff did not honour its obligations to the defendant, without any reference to the sales agency agreement. The defendant informed the plaintiff that the call was made because there were

arrears of rental due to the defendant from another company known as Mackt HWT Freight Sdn Bhd ('Mackt HWT') under a tenancy agreement relating to the rental of Masgo VDU and the rental for the Kuala Lumpur International Airport premises due from Mackt HWT. The other reason cited for the call on the guarantee was for electricity charges that were due from Mackt HWT. The High Court dismissed the plaintiff's claim after having pierced the corporate veil of Mackt HWT and found that the same individual was responsible for the plaintiff as well as Mackt HWT. Hence, this appeal by the plaintiff.

Held (allowing appeal; setting aside decision of High Court) Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) Once a company is incorporated, a veil is cast over the true controllers of the company, through which the law will not usually penetrate. There was no standard principle to guide the courts in piercing the corporate veil. However, there are statutory as well as common law exceptions to the principle enunciated in *Salomon v. Salomon & Co*, and once a case comes within one of the exceptions, the courts may lift the veil of incorporation. In piercing the corporate veil, the facts of the case must be examined and it must be clearly pleaded that the veil should be lifted. (paras 19, 34, 35 & 39)

(2) It was not disputed that the plaintiff and Mackt HWT were different companies and were separate legal entities. The fact that both companies had common directors or shareholders did not negate the fact that both companies were separate legal entities. The High Court Judge, having found that the plaintiff and Mackt HWT were two different legal entities, erred in law and in fact when His Lordship decided to lift the veil of incorporation when there was no legal justification or any special circumstances required by law to do so. Further, the defendant's failure to plead the requirements to pierce the veil of incorporation must be construed against the defendant. It was fatal. (paras 33, 42, 44 & 60)

(3) As the guarantee provided by the plaintiff was a conditional guarantee, it would only be triggered if the plaintiff commits a breach under the sales agency agreement. The onus was on the defendant to establish that its claim was made for monies or liabilities of the plaintiff under the sales agency agreement. However, the defendant's letter of demand did not state that

there were liabilities that had accrued under the sales agency agreement. The letter of demand was also vague and defective. The defendant had deliberately issued a vague letter of demand because they could not categorically state any liabilities or monies payable by the plaintiff under the sales agency agreement. In the circumstances, the defendant's letter of demand was rendered bad and invalid in law and therefore, the defendant must prove its claim against the plaintiff by way of a civil suit before it could keep the money it received under the bank guarantee. (paras 48, 53, 54, 56 & 67)

(4) The defendant had admitted that the rental and electricity charges under the tenancy agreement were due from Mackt HWT and not from the plaintiff. Further, even after the defendant made a call on the bank guarantee, the defendant continued to recover the rental charges from Mackt HWT by way of writ of distress. The defendant's action clearly showed that the amount for rental and electricity charged could not be due from the plaintiff and certainly not covered under the bank guarantee. (paras 62, 65 & 66)

(5) Masgo VDU was rented from another company called MAS Cargo Sdn Bhd and not from the defendant. There was no evidence advanced by the defendant to show that the charges for Masgo VDU were in fact due and payable to the defendant. Further, the sales agency agreement did not make any provision for Masgo VDU. Even if the charges for Masgo VDU was due and payable by the plaintiff to the defendant, the amount claimed could have been set off from the credit notes which were mistakenly issued by the defendant in favour of the plaintiff's account. If the credit notes and the payments were taken into account, the total amount claimed by the defendant for Masgo VDU would be set off completely. (paras 70-72)

(6) Appellate intervention is exercised in cases where there had been zero or insufficient judicial appreciation of evidence adduced by the witnesses. The trial judge as the trier of fact must assess, weigh and set out the reasons for accepting or rejecting the whole or any part of the evidence led by the parties. There was insufficient judicial appreciation of the relevant evidence herein and it had occasioned a serious miscarriage of justice warranting the exercise of appellate interference. (paras 76 & 80)

Bahasa Malaysia *Translation Of Headnotes*

Perayu ('plaintif') menjalankan perniagaan pengangkutan kargo udara dan pengendalian konsainan dan berurusan dengan berbagai Syarikat Penerbangan, termasuk responden ('defendan'). Bagi memudahkan urusan, plaintif memasuki perjanjian agensi jualan dengan defendan yang memerlukan plaintif memperuntukkan jaminan bank melalui sekuriti, yang plaintif telah lakukan. Jaminan bank tersebut adalah jaminan bersyarat dan sah bagi tempoh setahun. Sebelum jaminan bank tersebut luput, defendan mengeluarkan surat tuntutan kepada bank bagi bayaran terhadap jaminan tersebut. Surat tuntutan tersebut menyatakan bahawa plaintif tidak menjalankan kewajipannya kepada defendan, tanpa apa-apa rujukan kepada perjanjian agensi jualan. Defendan memaklumkan kepada plaintif bahawa permintaan bayaran tersebut dibuat kerana terdapat tunggakan sewa yang terhutang kepada defendan daripada satu lagi syarikat dikenali sebagai Mackt HWT Freight Sdn Bhd ('Mackt HWT') di bawah perjanjian sewaan berkaitan dengan sewa Masgo VDU dan sewa bagi premis Lapangan Terbang Antarabangsa Kuala Lumpur yang tertunggak daripada Mackt HWT. Satu lagi alasan yang disebut bagi permintaan bayaran atas jaminan tersebut adalah bagi caj elektrik yang tertunggak daripada Mackt HWT. Mahkamah Tinggi menolak tuntutan plaintif selepas menyingkap tirai pemerbadanan Mackt HWT dan mendapati bahawa individu yang sama bertanggungjawab bagi plaintif dan juga Mackt HWT. Maka rayuan ini oleh plaintif.

Diputuskan (membenarkan rayuan; mengenepikan keputusan Mahkamah Tinggi)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Jika sebuah syarikat diperbadankan, sebuah tirai terbentuk ke atas pengendali sebenar syarikat, yang mana undang-undang tidak akan biasanya menyingkap. Tidak ada prinsip yang standard sebagai panduan kepada mahkamah dalam menyingkap tirai pemerbadanan. Walau bagaimanapun, terdapat pengecualian statutori dan juga common law kepada prinsip yang diasaskan dalam kes *Salomon v. Salomon & Co*, dan sebaik sahaja sesuatu kes terangkum dalam pengecualian tersebut, mahkamah boleh menyingkap tirai pemerbadanan. Dalam menyingkap tirai pemerbadanan, fakta kes mesti diteliti dan ia mesti diplidkan dengan jelas bahawa tirai perlu disingkap.

(2) Tidak dipertikaikan bahawa plaintif dan Mackt HWT adalah syarikat yang berlainan dan entiti undang-undang yang berbeza. Fakta bahawa kedua-dua syarikat mempunyai pengarah-pengarah atau pemegang-pemegang saham tidak menafikan fakta bahawa kedua-dua syarikat adalah entiti undang-undang yang berbeza. Hakim Mahkamah Tinggi, selepas mendapati bahawa plaintif dan Mackt HWT adalah dua entiti undang-undang yang berbeza, terkhilaf di sisi undang-undang dan fakta apabila Yang Arif memutuskan untuk menyingkap tirai pemerbadanan apabila tidak ada justifikasi dari segi undang-undang atau apa-apa keadaan isitimewa yang diperlukan oleh undang-undang untuk berbuat demikian. Selanjutnya, kegagalan defendan memplidkan keperluan-keperluan supaya tirai pemerbadanan disingkap harus ditafsirkan menentang defendan. Ia adalah memudaratkan.

(3) Oleh sebab jaminan yang diberikan oleh plaintif adalah jaminan bersyarat, ia hanya akan tercetus apabila plaintif melakukan pelanggaran di bawah perjanjian agensi jualan. Beban adalah pada defendan untuk membuktikan bahawa tuntutannya dibuat bagi wang dan tanggungan plaintif di bawah perjanjian agensi jualan. Walau bagaimanapun, surat tuntutan defendan tidak menyatakan bahawa terdapat tanggungan-tanggungan yang terakru di bawah perjanjian agensi jualan. Surat tuntutan tersebut adalah kabur dan cacat. Defendan telah dengan sengaja mengeluarkan surat tuntutan yang cacat kerana mereka tidak boleh menyatakan secara terperinci apa-apa tanggungan atau wang yang perlu dibayar oleh plaintif di bawah perjanjian agensi jualan tersebut. Dalam keadaan tersebut, surat tuntutan defendan adalah menjadi cacat dan tidak sah di sisi undang-undang dan dengan itu, defendan perlu membuktikan tuntutannya terhadap plaintif melalui guaman sivil sebelum ia boleh menyimpan wang yang diterimanya di bawah jaminan bank tersebut.

(4) Defendan telah mengakui bahawa caj sewa dan elektrik di bawah perjanjian sewaan adalah tertunggak daripada Mackt HWT dan bukan daripada plaintif. Malahan, walaupun selepas defendan meminta pembayaran atas jaminan bank tersebut, defendan meneruskan untuk memperoleh caj sewa daripada Mackt HWT melalui writ distres. Tindakan defendan jelas menunjukkan bahawa jumlah bagi sewa dan elektrik yang dicaj bukan tertunggak daripada plaintif dan sememangnya tidak termasuk di bawah jaminan bank tersebut.

(5) Masgo VDU disewa daripada sebuah syarikat lain dikenali sebagai MAS Cargo Sdn Bhd dan bukan daripada defendan. Tidak ada keterangan yang dikemukakan oleh defendan untuk menunjukkan bahawa caj bagi Masgo VDU adalah sebenarnya tertunggak dan perlu dibayar kepada defendan. Selanjutnya, perjanjian agensi jualan tidak memperuntukkan bagi Masgo VDU. Walaupun caj bagi Masgo VDU adalah tertunggak dan perlu dibayar oleh plaintif kepada defendan, jumlah yang dituntut boleh ditolak daripada nota kredit yang dikeluarkan secara silap oleh defendan yang memihak kepada akaun plaintif. Jika nota kredit dan bayaran-bayaran tersebut diambil kira, jumlah keseluruhan yang dituntut oleh defendan bagi Masgo VDU boleh ditolak seluruhnya.

(6) Campur tangan peringkat rayuan akan dilaksanakan dalam kes-kes di mana terdapat pertimbangan kehakiman yang sifar atau tidak mencukupi bagi keterangan yang dikemukakan oleh saksi-saksi. Hakim bicara sebagai pembicara fakta perlu menilai, menimbangkan dan mengemukakan alasan-alasan bagi penerimaan atau penolakan keseluruhan atau sebahagian keterangan yang dikemukakan oleh pihak-pihak. Terdapat pertimbangan kehakiman yang tidak mencukupi bagi keterangan relevan di sini dan ia telah menjurus kepada salah laksana keadilan yang mewajarkan pelaksanaan campur tangan peringkat rayuan.

Case(s) referred to:

Abdul Aziz Atan & Ors v. Ladang Rengo Malay Estate Sdn Bhd [1985] 1 CLJ 255; [1985] CLJ (Rep) 370 HC ***(refd)***

Adams & Ors v. Cape Industries plc & Anor [1990] BCC 786 ***(refd)***

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Anjalai Ammal & Anor v. Abdul Kareem [1968] 1 LNS 8 FC ***(refd)***

Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121 HC ***(refd)***

Bank Bumiputra (M) Bhd & Anor v. Lorrain Esme Osman & Another Case [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 HC ***(refd)***

Briggs v. James Hardie & Co Pty Ltd [1989] 16 NSWLR 549 ***(refd)***

Catherine Lee v. Lee's Air Farming Ltd [1961] AC 12 PC ***(refd)***

Creasey v. Breachwood Motors Ltd [1992] BCC 638 ***(refd)***

Development & Commercial Bank Bhd v. Lam Chuan Co & Anor [1989] 1 CLJ 192; [1989] 1 CLJ (Rep) 489 HC ***(refd)***

Hew Sook Ying v. Hiw Tin Hee [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 SC ***(refd)***

Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor [1979] 1 LNS 32 HC ***(dist)***

Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 CA ***(refd)***

Lee Eng Eow v. Mary Lee & Anor [1999] 3 CLJ 143 CA ***(refd)***

Narayanan Ponnusamy v. Kannamah Ponnusamy [1993] 4 CLJ 389 HC ***(refd)***

Ong Thean Chye & Ors v. Tiew Choy Chai & Anor [2011] 1 CLJ 674 CA ***(refd)***

Ord v. Belhaven Pubs Ltd [1998] BCC 607 ***(refd)***

Pamol (Sabah) Ltd & Anor v. Joseph Paulus Lantip & Ors [2012] 1 LNS 466 CA ***(refd)***

Prest v. Petrodel Resources Ltd [2013] 4 All ER 673 SC ***(refd)***

Re A Company [1985] 1 BCC 99421 ***(refd)***

Re H and others (restraint order: realisable property) [1996] 2 All ER 391 CA ***(refd)***

Re Polly Peck International plc, Barlow & Ors v. Polly Peck International Finance Ltd & Anor [1996] BCC 486 ***(refd)***

S Manickam & Ors v. Ismail Mohamad & Ors [1996] 1 LNS 117 HC ***(refd)***

Salomon v. Salomon & Co Ltd [1897] AC 22 HL ***(foll)***

State of Rajasthan v. Hanuman AIR [2001] SC 282 ***(refd)***

Teknik Cekap Sdn Bhd v. Public Bank Bhd [1995] 4 CLJ 697 CA ***(refd)***

Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor [2011] 1 CLJ 491 CA ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC ***(refd)***

Trustor AB v. Smallbone & Ors [2002] BCC 795 ***(refd)***

Wong See Leng v. C Saraswathy Ammal [1954] 1 LNS 133 CA ***(refd)***

Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Yukong Lines Ltd of Korea v. Rendsburg Investments Corporation & Ors [1998] BCC 870 ***(refd)***

Yusoff Kassim v. PP [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376 SC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 16(5), 36, 46(6), 48(1)(a), (b), 48(4), 67(3), 121(2), 169, 304(1), (2), 365(2)

Income Tax 1967, s. 140(1)

Other source(s) referred to:

Dr John Phillips and Dr James O'Donovan, *The Modern Contract of Guarantee*, 2nd edn, pp 663-664

For the plaintiff/appellant - S Murthi; M/s S Murthi & Assocs

For the defendant/respondent - Abdul Halim Kasim; M/s Shafik, Sallehuddin & Kamal

[Appeal from High Court, Kuala Lumpur; Civil Suit No: 57-22-137-2003]

Reported by S Barathi

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] The parties will be referred to like what they were referred to before the High Court. Thus, Mackt Logistics (M) Sdn Bhd will be referred to as the plaintiff while Malaysian Airline System Bhd will be referred to as the defendant.

[2] This is the second appeal to this court from the same trial. The first appeal was allowed by another panel of this court and that panel remitted the case back to the High Court for further consideration and the order of the other panel can be seen at pp. 21 to 22 of the appeal record at part "A" and it was dated 13 July 2011. I was a member of that panel that sat on 13 July 2011 and both parties had no objections that I heard this second appeal.

The Salient Facts

[3] The plaintiff carried on the business of air cargo transportation and handling of consignment. In order to carry out the said business, the plaintiff had to deal with various airlines including but not limited to the defendant. In so far as the defendant was concerned, the plaintiff had to use the defendant to transport the plaintiff's cargo. For this purpose, the plaintiff entered into a sales agency agreement dated 5 May 1987 with the defendant. The sales agency agreement can be seen at pp. 196 to 199 of the appeal record at parts "B" and "C" and it was marked as exh. "P2".

[4] By the sales agency agreement, the defendant required the plaintiff to provide a bank guarantee by way of a security. And the plaintiff provided the bank guarantee *vide* number BG149G259349 dated 12 December 2001 from Bumiputra-Commerce Bank Berhad ("bank") as reflected at pp. 226 to 227 of the appeal record at parts "B" and "C" marked as exh. "P3".

[5] The bank guarantee was valid for a period of one year from 1 January 2002 until 31 December 2002.

[6] When asked about the purpose of the bank guarantee, one of the directors of the plaintiff by the name of Abdul Razak bin A S Dawood ("PW1") explained that as a sales agent for the

defendant, similar to that of a travel agent for passengers, the plaintiff used the air cargo transportation services of the defendant to transport the plaintiff's customers' goods. To assist the plaintiff to use the air cargo transportation services of the defendant, the defendant issued blank air waybills to the plaintiff. The plaintiff would then secure bookings from its customers and upon confirmation of the flight availability with the defendant, the air waybills would be filled and submitted to the defendant together with the plaintiff's customers' goods. Subsequently, the defendant will transmit to the plaintiff, the statement in regard to the charges for the air waybills that were used. Only at that point of time would the plaintiff be required to remit the necessary payment to the defendant.

[7] It is to ensure that the plaintiff would not default in making these payments for the air waybills that the defendant requires the plaintiff to provide the bank guarantee.

[8] Now, items 1 and 2 of the bank guarantee, guaranteed the defendant all monies and liabilities payable by the plaintiff under the sales agency agreement, up to a maximum amount of RM150,000. While item 3 of the bank guarantee clearly stated that the guarantee was for debts and liabilities under the sales agency agreement.

[9] The bank guarantee is a conditional guarantee.

[10] Just before the expiry of the bank guarantee, the defendant issued a letter of demand dated 28 November 2002 to the bank to call on the guarantee. The defendant's letter of demand can be seen at pp. 228 to 229 of the appeal record at parts "B" and "C" and it was marked as exh. "P5".

[11] Exhibit "P5" merely alleged that the plaintiff did not honour its obligations to the defendant. It makes no mention of the sales agency agreement where the plaintiff was required to provide a bank guarantee by way of a security.

[12] There was no breach by the plaintiff arising out of the sales agency agreement when the defendant made the call on the guarantee. And exh. "P5" failed to disclose any breach under the sales agency agreement for the call on the guarantee.

[13] The plaintiff contacted the defendant and was told that the call was made because there were arrears in rental due to the defendant from another company known as Mackt HWT Freight Sdn Bhd under a tenancy agreement dated 21 October 1998 which can be seen at pp. 200 to 223 and duly marked as exh. "P6". The rentals that were said to be due relate to:

(a) the rental of Masgo VDU amounting to RM6,400; and

(b) the rental for the Kuala Lumpur International Airport ("KLIA") premises due from Mackt HWT Freight Sdn Bhd, a third party and not the plaintiff, amounting to RM226,217.42.

[14] Another reason for the call of the guarantee was said to be the electricity charges that were due from Mackt HWT Freight Sdn Bhd, a third party and not the plaintiff, amounting to RM15,726.66.

[15] In so far as the rental of the Masgo VDU is concerned, the following facts must be taken into account:

(a) Masgo VDU was a facility that was provided outside the sales agency agreement by another company called MAS Cargo Sdn Bhd and that company is not the defendant;

(b) that Masgo VDU was not extended to the plaintiff when the sales agency agreement was executed on 5 May 1987;

(c) that the services of the Masgo VDU were in fact terminated by the plaintiff by its letter dated 10 July 2001 and MAS Cargo Sdn Bhd had since taken back the Masgo VDU;

(d) even though the services of Masgo VDU was terminated by the plaintiff and returned to the defendant, the defendant continued to charge rental for the Masgo VDU;

(e) based on the rental calculation stated by the defendant in their statement of account, it is clear that substantial amount of the claim of the Masgo VDU rental is for the period after the termination of the service; and

(f) even if there were any amount due for the Masgo VDU charges, the defendant admitted through their own credit notes issued to the plaintiff that the amount due would be sufficient to set off such charges.

Decision Of The High Court

[16] The High Court heard the case on its merits in obedience to the order of this court dated 13 July 2011 and His Lordship forthwith dismissed the plaintiff's claim with costs of RM5,000.

[17] In his written grounds of judgment, this was what His Lordship said at p. 33 of the appeal record at Part "A":

> (11) Meneliti kepada P3 Bank Guarantee tersebut adalah bukan 100 peratus tidak bersyarat. Bank Guarantee ini adalah tertakluk kepada P2-perjanjian antara defendan dan plaintif.
>
> (12) Diteliti pada keterangan yang ada tunggakan sewaan premis dan tunggakan bil elektrik dan air bukan melibatkan plaintif tetapi syarikat MACKT HWT yang tidak tercatit di mana-mana di dalam P2 atau P3.
>
> (13) Dua syarikat ini, MACKT Logistics (M) Sdn Bhd dan MACKT HWT adalah dua entiti yang berbeza walaupun SP1 adalah pemilik saham yang terbesar di dalamnya.

[18] And His Lordship after citing *Salomon v. Salomon & Co Ltd* [1897] AC 22, HL, and making reference to the decision of Salleh Abas FJ (as he then was) who sat at the High Court in the case of *Hotel Jaya Puri Bhd v. National Union of Hotel, Bar & Restaurant Workers & Anor* [1979] 1 LNS 32; [1980] 1 MLJ 109, pierced the corporate veil of Mackt HWT Freight Sdn Bhd and found that the same individual in the person of PW1 was responsible for the plaintiff as well as Mackt HWT Freight Sdn Bhd.

Our Decision

[19] We will first take the issue pertaining to lifting the veil of incorporation. Once a company is incorporated, a veil is cast over the true controllers of the company. It is a veil through which the law will not usually penetrate.

[20] Incorporation gives the company a legal personality, separate from its members. Basically what this amounts to is this. That a company may own property and may sue and be sued in its own corporate name. And that a company will not die even though its members die.

[21] 116 years ago, the corporate entity principle was firmly settled in the *Salomon*'s case. That was a case where Aron Salomon, the owner of a boot and leather business, sold it to a

company which he formed, in return for the fully paid up shares allotted to him and his family. Salomon also received secured debentures as an acknowledgement of the company's indebtedness to him. These were later mortgaged to an outsider. Soon after its formation, the company went into liquidation and this was at the behest of the unpaid trade creditors. Since the debentures were secured by a charge on the company's assets, it ranked in priority to the trade creditors and that being the case, the mortgage to the outsider was paid off. Approximately 1,000 pounds remained and Aron Salomon, now as the unencumbered owner of the debentures, claimed this in priority to the trade creditors. He succeeded and he also defeated the trade creditors' claim that he should be made to indemnify the company in respect of its debts. The House of Lords affirmed the principle that the company was a separate legal person from the controlling shareholder, and that it was not to be regarded as his agent. The House of Lords also made it clear that he was not liable to indemnify the creditors, thus giving effect to the limited liability doctrine.

[22] The corporate entity principle, which is now referred to as the "*Salomon*" principle was vigorously applied in *Catherine Lee v. Lee's Air Farming Ltd* [1961] AC 12, PC. There, Lee formed the respondent company for the sole business of aerial top-dressing. With the exception of one share that was alloted to Lee's nominee, all the other shares in the company were taken up by Lee. Lee played a major role as the governing director as well as being employed as the chief pilot of the company. While flying in the course of his business, he met with an accident and he was killed. His widow claimed compensation under the New Zealand Workers' Compensation Act. To succeed, she had to establish that Lee was a "worker" within the meaning of the said Act. The respondent company resisted the claim and contended that Lee, having full control of the company as the governing director, could not be in the position of a servant of the company as well. The New Zealand Court of Appeal upheld this contention on the ground that Lee could not hold this dual position – which simply meant that he had contracted with himself. The widow appealed to the Privy Council.

[23] After hearing the appeal, the Privy Council allowed the appeal and reiterated the "*Salomon*" principle and held that in law, Lee and Lee's Air Farming Ltd were two different persons and hence could enter into a contractual relationship and that

A therefore Lee, as an individual could by contract be a servant of Lee's Air Farming Ltd, despite his capacity as the governing director in the company.

[24] In Malaysia, the "*Salomon*" principle was applied in *Abdul*
B *Aziz Atan & Ors v. Ladang Rengo Malay Estate Sdn Bhd* [1985] 1 CLJ 255; [1985] CLJ (Rep) 370; [1985] 2 MLJ 165. There, the issues that came up for determination were whether the estate was sold and, if so, whether a change of employer took place. The court dismissed the appeal and held that an incorporated
C company was a legal person separate and distinct from the shareholders of the company. At p. 373 (CLJ); pp. 167 to 168 (MLJ), Shankar J had this to say:

> It is trite law that an incorporated company is a legal person separate and distinct from the shareholders of the company. The
D company from the date of incorporation has perpetual succession and the Companies Act provides that the liability on the part of the shareholders to contribute to the assets of the company will be limited in the manner provided by law and its memorandum and articles of association. The whole point of forming a limited
E company is that the shareholders can have in their hands the management of the business without incurring the risk of being under unlimited liability for the debts of the company.

[25] NH Chan JCA in *Lee Eng Eow v. Mary Lee & Anor* [1999] 3 CLJ 143; [1999] 3 MLJ 481, at p. 486, after applying the
F *Salomon*'s case *(supra)* and *Lee v. Lee's Air Farming Ltd (supra)*, had this to say:

> In addition to the statutory effects of incorporation, there is also a fundamental difference between an incorporated and an
G unincorporated association, in that an incorporated association has a legal personality of its own apart from the persons who comprise it. The separate legal personality of a company is not specifically provided for in the Companies Act. Nevertheless, the whole scheme of the Act is predicated upon the company's separate existence: see Walter Woon at p 25; and the well known
H cases of *Aron Salomon (Pauper) v. A Salomon & Co Ltd* [1897] AC 22 (HL) and *Lee v. Lee's Air Farming Ltd* [1961] AC 12 (PC).

[26] Zakaria Yatim J (later FCJ) in *Bank Bumiputra (M) Bhd & Anor v. Lorrain Esme Osman & Another Case* [1987] 1 CLJ 572;
I [1987] CLJ (Rep) 472; [1987] 1 MLJ 502, rightly held that a holding company and its subsidiary are separate entities.

[27] Statute wise, s. 16(5) of the Companies Act 1965 explains the effect of incorporation. Once incorporated, a company assumes a legal status of its own and is an entity independent of or distinct from its members and directors.

[28] At times, the "*Salomon*" principle appears to be unjust and the courts will pierce the corporate veil. In *Re A Company* [1985] 1 BCC 99421, the Court of Appeal took the view that the "*Salomon*" principle was applicable on a *prima facie* basis and held that "the court will use its powers to pierce the corporate veil if it is necessary to achieve justice ... ." The court in *Creasey v. Breachwood Motors Ltd* [1992] BCC 638 held that it had the power to lift the veil "to achieve justice where its exercise is necessary for that purpose" (per Judge Richard Southwell QC at p. 647).

[29] But there are several influential English Court of Appeal cases that firmly suppressed the approach of piercing the corporate veil "to achieve justice". In *Adams & Ors v. Cape Industries plc & Anor* [1990] BCC 786, the Court of Appeal held that (see p. 822):

> ... it is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere facade concealing the true facts.

[30] The following cases followed the *Adams v. Cape (supra)* approach:

(a) *Re Polly Peck International plc, Barlow & Ors v. Polly Peck International Finance Ltd & Anor* [1996] BCC 486;

(b) *Re H and others (restraint order: realisable property)* [1996] 2 All ER 391, CA;

(c) *Yukong Lines Ltd of Korea v. Rendsburg Investments Corporation & Ors* [1998] BCC 870; and

(d) *Ord v. Belhaven Pubs Ltd* [1998] BCC 607, CA.

[31] Sir Andrew Morritt VC in *Trustor AB v. Smallbone & Ors* [2002] BCC 795, at p. 801, held that the court would be "entitled 'to pierce the corporate veil' and recognise the receipt of the company as that of the individual(s) in control of it if the company was used as a device or facade to conceal the true facts thereby avoiding or concealing any liability of those individual(s)".

[32] In the *Hotel Jayapuri (supra)* case, Salleh Abas FJ (as he then was) rightly lifted the veil of incorporation on the facts of that case because it concerned the Industrial Relations Act 1967 where the Industrial Court was required to disregard technicalities and to take into account the rules of equity, good conscience and the merits of the case. Here, we are not dealing with the Industrial Relations Act 1967. Here, we have in our midst the sales agency agreement and the plaintiff did not breach the said agreement. Here too, the call on the guarantee as reflected in exh. "P5" did not disclose any breach on the part of the plaintiff.

[33] Here, the High Court Judge having found that the plaintiff and Mackt HWT Freight Sdn Bhd are two different legal entities, erred in law and in fact when His Lordship decided to lift the veil of incorporation when there was no legal justification or any special circumstances required by law to do so.

[34] Way back in 1989, Rogers AJA in the New South Wales Court of Appeal in *Briggs v. James Hardie & Co Pty Ltd* [1989] 16 NSWLR 549 recognised that there was no standard principle to guide the courts in piercing the corporate veil. At p. 567, His Lordship had this to say:

> The threshold problem arises from the fact that there is no common, unifying principle, which underlies the occasional decision of courts to pierce the corporate veil. Although an ad hoc explanation may be offered by a court which so decides, there is no principled approach to be derived from the authorities ... .

[35] But there are statutory as well as common law exceptions to the "*Salomon*" principle. And once a case comes within one of the exceptions, the courts may lift the veil of incorporation.

[36] The statutory provisions in the Companies Act 1965 that permit the courts to lift the veil of incorporation and investigate the commercial reality behind it are ss. 36, 46(6), 48(1)(a) and (b), 48(4), 67(3), 121(2), 169, 304(1), 304(2) and 365(2).

[37] The corporate veil may also be lifted under s. 140(1) of the Income Tax 1967.

[38] Recently, Lord Sumption SCJ in *Prest v. Petrodel Resources Ltd* [2013] 4 All ER 673, SC, writing the first judgement of the Supreme Court ploughed through the law pertaining to piercing

the veil of incorporation in the context of considering the question of whether the respondent spouse was entitled or to be treated as entitled to properties held by the companies. It bears repetition to quote the speech of His Lordship at pp. 685 to 686 of the report:

Piercing The Corporate Veil

(16) I should first of all draw attention to the limited sense in which this issue arises at all. 'Piercing the corporate veil' is an expression rather indiscriminately used to describe a number of different things. Properly speaking, it means disregarding the separate personality of the company. There is a range of situations in which the law attributes the acts or property of a company to those who control it, without disregarding its separate legal personality. The controller may be personally liable, generally in addition to the company, for something that he has done as its agent or as a joint actor. Property legally vested in a company may belong beneficially to the controller, if the arrangements in relation to the property are such as to make the company its controller's nominee or trustee for that purpose. For specific statutory purposes, a company's legal responsibility may be engaged by the acts or business of an associated company. Examples are the provisions of the Companies Acts governing group accounts or the rules governing infringements of competition law by 'firms', which may include groups of companies conducting the relevant business as an economic unit. Equitable remedies, such as an injunction or specific performance, may be available to compel the controller whose personal legal responsibility is engaged to exercise his control in a particular way. But when we speak of piercing the corporate veil, we are not (or should not be) speaking of any of these situations, but only of those cases which are true exceptions to the rule in *Salomon v. A Salomon & Co Ltd* [1897] AC 22, [1895-9] All ER Rep 33, ie where a person who owns and controls a company is said in certain circumstances to be identified with it in law by virtue of that ownership and control.

(17) Most advanced legal systems recognise corporate legal personality while acknowledging some limits to its logical implications. In civil law jurisdictions, the juridical basis of the exceptions is generally the concept of abuse of rights, to which the International Court of Justice was referring in *Barcelona Traction Light and Power Co Ltd Case (Second Phase)* [1970] ICJ 3 when it derived from municipal law a limited principle permitting the piercing of the corporate veil in cases

of misuse, fraud, malfeasance or evasion of legal obligations. These examples illustrate the breadth, at least as a matter of legal theory, of the concept of abuse of rights, which extends not just to the illegal and improper invocation of a right but to its use for some purpose collateral to that for which it exists.

(18) English law has no general doctrine of this kind. But it has a variety of specific principles which achieve the same result in some cases. One of these principles is that the law defines the incidents of most legal relationships between persons (natural or artificial) on the fundamental assumption that their dealings are honest. The same legal incidents will not necessarily apply if they are not. The principle was stated in its most absolute form by Denning LJ in a famous *dictum* in *Lazarus Estates Ltd v. Beasley* [1956] 1 All ER 341 at 345, [1956] 1 QB 702 at 712:

> No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever ... .

The principle is mainly familiar in the context of contracts and other consensual arrangements, in which the effect of fraud is to vitiate consent so that the transaction becomes voidable *ab initio*. But it has been applied altogether more generally, in cases which can be rationalised only on grounds of public policy, for example to justify setting aside a public act such as a judgment, which is in no sense consensual, a jurisdiction which has existed since at least 1775: *Duchess of Kingston's Case* [1776] 2 Smith LC 644 at 646, 651. Or to abrogate a right derived from a legal status, such as marriage: *R v. Secretary of State for the Home Dept, ex p Puttick* [1981] 1 All ER 776, [1981] QB 767. Or to disapply a statutory time bar which on the face of the statute applies: *Welwyn Hatfield BC v. Secretary of State for Communities and Local Government* [2011] UKSC 15, [2011] 4 All ER 851, [2011] 2 AC 304. These decisions (and there are others) illustrate a broader principle governing cases in which the benefit of some apparently absolute legal principle has been obtained by dishonesty. The authorities show that there are limited circumstances in which the law treats the use of a company as a means of evading the law as dishonest for this purpose.

> (19) The question is heavily burdened by authority, much of it characterised by incautious *dicta* and inadequate reasoning. I propose, first, to examine those cases which seek to rationalise the case law in terms of general principle, and then to look at a number of cases in which the court has been thought, rightly or wrongly, to have pierced the corporate veil in order to identify the critical features of these cases which enabled them to do so.

[39] In piercing the corporate veil, the facts of the case must be examined and it must be clearly pleaded that the veil should be lifted.

[40] Now, it was submitted that the High Court was wrong in piercing the veil of incorporation of Mackt HWT Freight Sdn Bhd under the guise of doing justice. It was also submitted that no sufficient ground was advanced before the High Court for the veil of incorporation of Mackt HWT Freight Sdn Bhd to be pierced. After examining a long line of authorities in regard to lifting the veil of incorporation, Abdul Malik Ishak, JCA in *Tenaga Nasional Bhd v. Irham Niaga Sdn Bhd & Anor* [2011] 1 CLJ 491; [2011] 1 MLJ 752, CA, had this to say at p. 515 (CLJ); p. 772 (MLJ):

> (49) You cannot simply raise the veil of incorporation just because you feel that it is in the interest of justice. But if there is fraud, then the veil of incorporation may be lifted. But here, there was no fraud at all.

[41] Gopal Sri Ram, JCA (later FCJ) in *Law Kam Loy & Anor v. Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355, CA, writing for this court aptly said at p. 362:

> In my judgment, in the light of the more recent authorities such as *Adams v. Cape Industries Plc* [1990] Ch 433, it is not open to the courts to disregard the corporate veil purely on the ground that it is in the interests of justice to do so. It is also my respectful view that the special circumstances to which Lord Keith referred include cases where there is either actual fraud at common law or some inequitable or unconscionable conduct amounting to fraud in equity.

[42] To compound the matter further, it was not the defendant's pleaded case that the veil of incorporation between the plaintiff and Mackt HWT Freight Sdn Bhd must be lifted. In this context, reference should be made to the case of *Pamol (Sabah) Ltd &*

Anor v. Joseph Paulus Lantip & Ors [2012] 1 LNS 466; [2012] 5 MLJ 616, CA, where Abdul Malik bin Ishak, JCA writing for the Court of Appeal, had this to say at p. 625:

> (20) However, it bears repetition to say that there was a failure on the part of the six plaintiffs to particularise the plea that all the four defendants operated as a group enterprise constituting one single commercial unit as distinct from being separate legal entities. In this context, we refer to the case of this court in *ATA Management Consultants Sdn Bhd v. Makmuran Sdn Bhd* [2004] 3 CLJ 53 (CA), a judgment of Gopal Sri Ram JCA (later FCJ). There at pp 57-58, his Lordship had this to say:
>
> > Since the respondent company did nothing to offend the terms of the agreement to which we have referred, no question of construction arises. It is a non-issue. The shareholders owned their shares. They could do with those shares as they wished. They did so. They sold it to a third party. That offended the agreement between the respondent and appellant not a jot. To cap it all, there was no plea taken before the learned judge that this was an appropriate case for the veil of incorporation to be lifted.

[43] Again, Abdul Malik bin Ishak, JCA made reference to the need to adhere to the pleadings in *Ong Thean Chye & Ors v. Tiew Choy Chai & Anor* [2011] 1 CLJ 674; [2011] 4 MLJ 616, CA, at p. 714 (CLJ); p. 649 (MLJ):

> (76) The respondents' statement of claim did not allude to the need to lift the veil of incorporation of the third appellant and we are reluctant to do so. The parties must be bound by their pleadings.

[44] In our judgment, the defendant's failure to plead the requirement to pierce the veil of incorporation must be construed against the defendant. It was fatal.

[45] It is salutary to state that the parties are bound by their pleadings (*Wong See Leng v. C Saraswathy Ammal* [1954] 1 LNS 133; [1954] 1 MLJ 141, CA, at p. 142 (MLJ); *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; [1990] 2 MLJ 152, SC, at p. 333 (CLJ); p. 154 (MLJ); *Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd* [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121; [1992] 2 MLJ 615; *S Manickam & Ors v. Ismail Mohamad & Ors* [1996] 1 LNS 117; [1997] 2 MLJ 90;

Narayanan Ponnusamy v. Kannamah Ponnusamy [1993] 4 CLJ 389; [1993] 3 MLJ 730; and *Anjalai Ammal & Anor v. Abdul Kareem* [1968] 1 LNS 8; [1969] 1 MLJ 22, FC). And the defendant must adhere to this simple principle of law.

[46] Next, we will consider whether the defendant's demand and call under the conditional guarantee was proper and valid in law. The bank guarantee in exh. "P3" was worded in this way:

> Bank Guarantee No: BG149G259349
>
> In consideration of Messrs. Malaysia Airlines System Berhad (hereinafter referred as 'the Beneficiary') agreeing to appoint Messrs. Mackt Logistics (M) Sdn Bhd (hereinafter referred as 'the Agent') as the Beneficiary agent under Sales Agency Agreement executed/to be executed and any Supplemental Agreements executed thereafter between the Beneficiary and the Agent and in any and all transactions connected with the appointment as the Beneficiary agent, we: Bumiputra-Commerce Bank Berhad with the registered Office at No. 6, Jalan Tun Perak, Kuala Lumpur and the operation branch at Lot RB 5 Terminal 3, Sultan Abdul Aziz Shah Airport, 47200 Subang, Selangor Darul Ehsan (hereinafter referred to as 'the Guarantor'), hereby agree to guarantee the liabilities of the Agent upon the terms and conditions hereinafter appearing:
>
> 1. The Guarantor guarantees to pay the Beneficiary upon written demand all monies and liabilities as shall be payable by the Agent under the terms of the said Agency Agreement.
>
> 2. This Guarantee shall be a continuing guarantee but our liability hereunder for a sum of up to a maximum amount of and not exceeding Ringgit Malaysia One hundred fifty thousand (RM150,000.00) only (hereinafter referred to as 'the Guaranteed Sum').
>
> 3. Within the Guaranteed Sum, this Guarantee shall extend to and be applicable to the whole debt and liabilities of the Agent to the Beneficiary under the terms of the said Agency Agreement.
>
> 4. The Beneficiary shall be at liberty without discharging the Guarantor from liability hereunder to grant time or other indulgence to the Agent.
>
> 5. In order to give full effect to the provisions of this Guarantee, the Guarantor hereby waive all rights inconsistent with such provisions and which the Guarantor might otherwise as sureties be entitled to claim and enforce.

A

6. This Guarantee is for a period of one year from 1st day of January, 2002 to 31st day of December, 2002 (hereinafter referred to as 'the Validity Period') and during this period the Guarantor guarantees herein provided shall be unconditional and irrevocable.

B

7. All demands from the Beneficiary for any payment under this Guarantee, shall be in writing and must be received by the Guarantor within the Validity Period or by the close of business on 28th day of February, 2003 (hereinafter referred to as 'the Expiry Date'), after which the Expiry Date this

C

Guarantee shall be deemed to be null and void. It is expressly agreed and understood that the Guarantor shall not be liable to make any payment(s) to the Beneficiary on any demand(s) received by the Guarantor after the Expiry Date.

8. This guarantee shall supersede and cancel the guarantee No.

D

BG149G259284.

Dated this 12th day of December, 2001.

[47] The bank guarantee expressly stipulates four main conditions, namely:

E

(a) that the bank guarantees the liability of the plaintiff upon the terms and conditions as stipulated in the bank guarantee;

(b) that the bank guarantee shall be a continuing guarantee and not exceeding the sum of RM150,000;

F

(c) that the bank is to pay upon demand all monies and liabilities payable by the plaintiff under the terms of the sales agency agreement; and

G

(d) that the bank guarantee shall extend and be applicable to all debts and liabilities payable by the plaintiff under the sales agency agreement.

[48] Given that the guarantee provided by the plaintiff was a

H

conditional guarantee, it would only be triggered if the plaintiff commits a breach under the sales agency agreement. According to Dr John Phillips and Dr James O'Donovan in their book entitled, "*The Modern Contract of Guarantee*", 2nd edn., at pp. 663 to 664:

I

> The first type is a conditional performance bond whereby the guarantor only becomes liable upon proof of a breach of the terms of the principal contract by the builder, and the proprietor sustaining loss as a result of such breach. The guarantor's liability, therefore, will only arise in the usual way as a result of the principal's default.

[49] This passage was said in the context of a building contract and it is equally applicable in construing the bank guarantee in exh. "P3". Shaik Daud JCA in *Teknik Cekap Sendirian Bhd v. Public Bank Berhad* [1995] 4 CLJ 697; [1995] 3 MLJ 449, in construing a performance bond had this to say at p. 701 (CLJ); p. 454 (MLJ) of the report:

> Having considered the submissions it is relevant to find out what therefore is a performance bond. As I see it there is nothing special or unique in a performance bond. It is in fact a written contract of guarantee by a bank, other financial institutions or in some cases an insurance company, whereby they guarantee the due performance of a contract and in the event of a breach or non-performance of the contract, they guarantee to pay, on a written demand being made, the sum stipulated in the guarantee. Therefore a performance bond is nothing more than a written guarantee, and in order to interpret the obligations of the bank, one need only to look at the written bond itself to determine what are the terms and conditions agreed upon between the parties. A great deal, therefore, depends on the wording of the bond itself.

[50] And His Lordship surmised at p. 702 (CLJ); p. 455 (MLJ) of the report that:

> There is no doubt that some performance bond must be paid merely on a demand being made, and whether this is so must depend on the wording of the bond itself.

[51] Just like the performance bond, the bank guarantee in this case crystallised and payable on demand and it is dependent on the wording of the bank guarantee itself.

[52] Again, in the *Teknik Cekap*'s case, His Lordship construed the performance bond in this manner (see p. 702 (CLJ); p. 455 (MLJ) of the report):

> In the present case, however, the bond began with the words 'If the sub-contractor .... shall in any respect fail to execute the contract or commit any breach of his obligations thereunder then the guarantor shall pay .... '. Now from the the very wording of the bond itself it is clear and unequivocal that what would trigger off the guarantee is the sub-contractor's failure to execute the contract or commit any breach thereof. Then and only then would the liability of the guarantor arise. Therefore giving the words in the bond their plain meaning, it cannot by any stretch of imagination be said that the bond in the circumstances of this case is an unconditional bond.

[53] Likewise in the present appeal, the bank guarantee would only be payable if there were monies and liabilities payable by the plaintiff under the sales agency agreement.

[54] The onus was on the defendant to establish that its claim was made for monies or liabilities of the plaintiff under the sales agency agreement. The defendant's letter of demand dated 28 November 2002 as per exh. "P5" did not state that there were liabilities that had accrued under the sales agency agreement, and factually speaking, none existed. The defendant's letter of demand in exh. "P5" was also vague and defective. It was rightly submitted that the defendant deliberately issued a vague letter of demand because they cannot categorically state any liabilities or monies payable by the plaintiff under the sales agency agreement.

[55] For convenience, the defendant's letter of demand in exh. "P5" will now be reproduced:

> Claim Against Your Bank Guarantee No. BG149G259349 Dated 12 December 2001 Amounting RM150,000.00 Messrs Mackt Logistics (M) Sdn. Bhd.
>
> Messrs Mackt Logistics (M) Sdn Bhd has failed to honour their obligations and liabilities to Malaysia Airlines.
>
> In consideration of you agreeing the liabilities of the abovenamed, we hereby wish to claim the abovesaid bank guarantee with immediate effect.
>
> Please forward Bank Draft/Cashiers Order for RM150,000.00 for the attention of the undersigned at the following address:
>
> Manager Credit Control
> Credit Control Department
> Malaysian Airline System Berhad
> 14th Floor, Bangunan MAS
> Jalan Sultan Ismail
> 50250 KUALA LUMPUR
> Tel: 03-21655955
>
> We undertakes to return the original Bank Guarantee upon receipt of the Bank Draft.

[56] It is crystal clear that the defendant's letter of demand in exh. "P5" as reproduced did not make any reference to the sales agency agreement. Such a failure would render the defendant's letter of demand in exh. "P5" bad and invalid in law.

[57] In our judgment, the High Court having found that the bank guarantee was a conditional guarantee failed to consider whether the defendant's claim and demand under the bank guarantee were proper and valid in law.

[58] It must be borne in mind that the defendant's claim and demand on the bank guarantee were not for monies due under the sales agency agreement. The defendant's stand, all along, was that its demand (although not reflected in its letter of demand in exh. "P5") focused on the rentals that were due under the tenancy agreement dated 21 October 1998 as per exh. "P6", the electricity charges due under the same tenancy agreement and the rental for Masgo VDU.

[59] The company search of the plaintiff's company can be found at pp. 33 to 38 of the appeal record at parts "B" and "C" and it was marked as exh. "P7". While the company search of Mackt HWT Freight Sdn Bhd is marked as exh. "P8" and it is found at pp. 39 to 44 of the appeal record at parts "B" and "C".

[60] It is not disputed that the plaintiff and Mackt HWT Freight Sdn Bhd are different companies and are separate legal entities. The fact that both the companies have common directors or shareholders do not negate the fact that both the companies are separate legal entities. In this connection, it is germane to refer to the case of *Development & Commercial Bank Bhd v. Lam Chuan Co & Anor* [1989] 1 CLJ 192; [1989] 1 CLJ (Rep) 489; [1989] 1 MLJ 318, a decision of Abdul Malek bin Ahmad J (later the President of the Court of Appeal). His Lordship after referring to the "*Salomon*" principle aptly said at pp. 492-493 (CLJ); p. 320 (MLJ) of the report:

> This was affirmed by the Court of Appeal. However, the House of Lords was of the view that the said limited company was perfectly lawful as a valid legal entity and it was absolutely separate and apart from Salomon himself.
>
> Lord Macnaghten had made the observation that the company is at law a different person altogether from the subscribers to the memorandum and though it may be after incorporation the business is precisely the same as it was before, the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them.

[61] Mohd Azmi SCJ delivering the judgment of the Supreme Court in *Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120, SC, at p. 127 alluded to the principle of incorporation in this way:

> It is a well established principle of law that a limited company incorporated under the Companies Act and the individuals forming the company are distinct legal entities, however complete in control (might) be by one or more individuals of the company (see *Salomon v. Salomon & Company Ltd.* [1897] AC 22). (See also *Tunstall v. Steigman* [1962] 2 QB 593).

[62] The defendant admitted that the rental and electricity charges under the tenancy agreement were due from Mackt HWT Freight Sdn Bhd and not from the plaintiff. And according to the evidence of Wan Mohammad Mokhter bin Wan Abdul Latiff ("DW1") - see his witness statement at Q & A No: 23, the rental and electricity charges were meant for the demised premises at KLIA.

[63] During cross-examination, DW1 was aware and agreed that the rental and electricity charges were due from Mackt HWT Freight Sdn Bhd and not from the plaintiff. At p. 146 of the appeal record at parts "B" and "C", this was what DW1 said under cross-examination:

> Q: Saya merujuk kepada Enclosure 22 - P6 di mukasurat 9, Tenancy Agreement - anda sahkan item B dan C merujuk kepada soalan no. 23, pembayaran di bawah Tenancy Agreement bertarikh 21.10.1998 (P6)?
>
> A: Setuju.
>
> Q: Merujuk kepada P6, Perjanjian Penyewaan anda sahkan bahawa perjanjian penyewaan adalah di antara defendan dengan MACKT HWT Freight Sdn Bhd no. Syarikat 68726-K?
>
> A: Saya setuju.
>
> Q: Sila rujuk Enclosure 22 di mukasurat 33 dan 39 (P7 dan P8). P7 - Carian syarikat plaintif, adakah awak setuju berdasarkan P7 dan P8 bahawa MACKT HWT Freight Sdn Bhd (P8) adalah syarikat yang berasingan daripada syarikat plaintif?
>
> A: Saya setuju.

Q: Ketika defendan membuat tuntutan di bawah Bank Guarantee, adakah defendan sedar bahawa MACKT HWT Freight Sdn Bhd dan syarikat plaintif adalah 2 syarikat yang berasingan.

A: Ya, saya sedar.

[64] Continuing at p. 149 of the appeal record at parts "B" and "C", DW1 agreed to the following question:

Q: Awak setuju akibat daripada P10 dan Notis Penyata defendan sesungguhnya ketahui bahawa tuntutan sewa dan bil elektrik harus dibayar oleh MACKT HWT?

A: Saya setuju.

[65] It is appropriate to say that even after the defendant made a call on the bank guarantee, the defendant continued to recover the rental charges from Mackt HWT Freight Sdn Bhd by way of a writ of distress *vide* Originating Application No: 54-1-2003 at the Sessions Court at Bandar Baru on 24 January 2003 as reflected in exh. "P10". And the notice of attachment and inventory were also issued by the court pursuant to the writ of distress. DW1 was cross-examined about the writ of distress and this was what he said at p. 149 of the appeal record at parts "B" and "C":

Q: P10 - Writ of Distress, adakah awak setuju tindakan ini telah diambil bagi penyewaan premis di KLIA termasuk electricity?

A: Setuju.

Q: Tindakan P10 - Writ of Distress dikeluarkan pada 24.1.2003?

A: Setuju.

Q: Rujuk Enclosure 22 - P5 di mukasurat 7, Surat Tuntutan oleh defendan kepada plaintif atas Bank Guarantee. Adakah awak setuju bahawa Writ of Distress terhadap MACKT HWT telah dikeluarkan oleh defendan selepas buat tuntutan kepada plaintif di bawah Bank Guarantee?

A: Saya setuju.

Q: Ekoran Writ of Distress itu di mukasurat 5 Enclosure 27 - barangan MACKT HWT telah disita?

A: Setuju.

[66] In our judgment, the defendant's actions in pursuing their claim for rental from Mackt HWT Freight Sdn Bhd clearly showed that the amounts for rental and electricity charges cannot be due from the plaintiff and certainly not covered under the bank guarantee.

[67] In answering the question whether the defendant's demand and call under the conditional bank guarantee was proper and good in law, we would answer it in the negative. That being the case, the defendant must prove its claim against the plaintiff by way of a civil suit before it can keep the monies it received under the bank guarantee.

[68] Next, in regard to the Masgo VDU, it must be emphasised that it was rented from MAS Cargo Sdn Bhd and not from the defendant. Both PW1 and Mahmud bin Sulaiman (PW2) testified that Masgo VDU was not provided by the defendant but by another company by the name of MAS Cargo Sdn Bhd and this fact was not challenged during cross-examination (*Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639, CA, at pp. 658 to 659). In fact, the chairman of the Airfreight Forwarders Association of Malaysia by the name of Francis Walter Culas (PW3) testified and confirmed that Masgo VDU was not provided by the defendant but by MAS Cargo Sdn Bhd.

[69] Even DW1 - the defendant's own witness, confirmed that MAS Cargo Sdn Bhd was a subsidiary company of the defendant (see the cross-examination of DW1 at p. 147 of the appeal record at parts "B" and "C").

[70] In our judgment, no evidence was advanced by the defendant to show that the charges for Masgo VDU was in fact due and payable to the defendant. There was no letter of authorisation from MAS Cargo Sdn Bhd authorising the defendant to collect or claim the VDU charges from the plaintiff. And neither were there any invoices from the defendant to the plaintiff for the VDU.

[71] To compound the matter further, the sales agency agreement made no provision for the Masgo VDU. Be that as it may, Masgo VDU was terminated by the plaintiff on 10 July 2001.

[72] Now, even if the charges for the Masgo VDU was due and payable by the plaintiff to the defendant, the defendant's accountant by the name of Azuan Mohd Zaman ("DW2") categorically admitted that the amount claimed by the defendant could have been set off from the credit notes which were issued by the defendant. These credit notes were issued in favour of the plaintiff's account. These credit notes were mistakenly given to the plaintiff's account by the defendant and the mistakes were in relation to the bills which were issued by the defendant to the plaintiff. And if these credit notes and payments were taken into account, then the total amount claimed by the defendant for the Masgo VDU would be set off completely.

Conclusion

[73] The sum total of it all would be this. That the defendant having received the monies under the bank guarantee failed to prove the amount that the defendant claimed under the said guarantee was in fact due and payable by the plaintiff. Since the plaintiff had denied the amount claimed by the defendant under the bank guarantee in this writ action, the onus shifted to the defendant to prove that they had a valid claim against the plaintiff before they made their demand under the bank guarantee. The plaintiff had categorically pleaded that the defendant's claim was wrong and baseless and has put the defendant to strict proof thereof. DW2, an accountant, was unable to give any credible evidence as to the amount claimed by the defendant. It must be borne in mind that DW2 had no personal knowledge about the statement of account which he produced in court. To aggravate the matter further, DW2 was unable to say as to how the claims for rental and electricity charges arose or for which premises the amounts were claimed by the defendant. DW2 was also not in the position to tell as to why the claims for the rental and electricity charges under the tenancy agreement for the KLIA premises were combined with the Masgo VDU charges in one account.

[74] It must be recalled that DW1 admitted that the defendant has not produced any evidence to support its claim against the plaintiff. It is prudent to reiterate that the defendant failed to produce any invoice which was issued for the rental and electricity bills for the premises in order to prove that these payments were in fact due from the plaintiff. The defendant also failed to produce invoices for the Masgo VDU. However, to be fair, the defendant produced a statement of account without any supporting documents.

[75] The plaintiff had put the defendant to strict proof, yet there was no credible evidence before the High Court pertaining to the amount claimed by the defendant. In our judgment, based on the evidence adduced, the defendant failed to prove the claim against the plaintiff and the demand which the defendant made under the bank guarantee. It is our judgment that the High Court failed to consider the defendant's failure to prove the amount claimed under the bank guarantee.

[76] Appellate intervention is exercised in cases where there has been zero or insufficient judicial appreciation of the evidence adduced by the witnesses. The trial judge as the trier of fact must assess, weigh and set out the reasons for accepting or rejecting the whole or any part of the evidence led by the parties. In deciding to accept or to reject the evidence of a witness, the trial judge must apply the correct criteria, namely:

(a) take into account the motive that a witness may harbour while giving evidence;

(b) consider the contemporaneous documents and test it against the oral evidence of a witness;

(c) view the evidence of a witness against the probabilities of the case; and

(d) conduct a critical analysis of the witness evidence.

[77] Chang Min Tat FJ in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229 FC, at p. 234 aptly said:

> Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[78] Edgar Joseph Jr SCJ in *Yusoff Kassim v. Public Prosecutor* [1992] 3 CLJ 1535; [1992] 1 CLJ (Rep) 376; [1992] 2 MLJ 183, SC at p. 380 (CLJ); p. 188 (MLJ) succinctly said:

> In all the circumstances, having regard to the fact that the trial judge had overlooked or failed to take into account or given proper weight to, or drawn proper inferences from, the matters to which we have adverted, which otherwise might have caused him to come to a different conclusion, we were satisfied that he

had not taken proper advantage of his having seen and heard the witnesses (per Lord Thankerton in *Watt or Thomas v. Thomas* [1947] 1 All ER 582) and so the present appeal came within the range of those cases where we were at liberty to act upon our own view of the conflicting evidence.

[79] DP Mohapatra J, delivering the judgment of the Supreme Court of India in *State of Rajasthan v. Hanuman* AIR [2001] SC 282 at p. 284 had this to say about appellate intervention:

No doubt the appellate court should assess the evidence on record with a view to satisfy itself that the appreciation of evidence by the trial court is not vitiated on account of any erroneous approach or illegality and it is not palpably erroneous. The sustainability of the judgment depends on the soundness of the reasons given in support of the findings and the conclusion.

[80] Here, in our judgment, there was insufficient judicial appreciation of the relevant evidence and it has occasioned a serious miscarriage of justice. We accordingly exercised our appellate interference to right the wrong, so to speak.

[81] For these varied reasons, we allowed the plaintiff's appeal with costs of RM35,000 here and below. We set aside the decision of the High Court. The deposit to be refunded to the plaintiff.